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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SAMUEL D. WRIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether on his present motion under 28 U.S.C. § 2255 Samuel Wright should be required to clear a significantly higher hurdle than he faced on direct appeal in order to prevail on the issue of prosecutorial conflict of interest which he raised on his direct appeal and which was decided against him on that appeal because the United States Attorney's office and the Justice Department then misstated and concealed facts that would have led the Court to rule in his favor?

2. Whether this Court and the Courts of Appeal possess the authority to exercise their supervisory power over the administration of justice in this proceeding under 28 U.S.C. § 2255?

3. Whether Samuel Wright was deprived

of his right to due process of law and to indictment by an impartial and independent grand jury in violation of the Fifth Amendment because the case against him was presented to a second grand jury by an Assistant United States Attorney who had an improper personal interest in securing Wright's indictment and the government thereafter rejected Wright's charges of conflict of interest before his indictment on the basis of a perfunctory investigation and concealed and misstated facts bearing on the conflict of interest issue and the investigation when the issue was raised by Wright before and after trial and on his direct appeal?

4. Whether Samuel Wright should have been granted the full discovery and the evidentiary hearing he repeatedly requested and was denied prior to the dismissal of his sec. 2255 proceeding?

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4. Samuel Wright should have been granted the full disand the evidentiary hearing he repeatedly requested and was denied prior to the dismissal of this sec. 2255 proceeding.

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OPINIONS BELOW

The opinion delivered by the Court of Appeals below is reported at 732 F. 2d 1048 (2d Cir. 1984). The opinion of the District Court is reported at 559 F. Supp. 1139 (E.D.N.Y. 1983). The opinion delivered by the Court of Appeals on Samuel Wright's direct appeal is reported at 588 F. 2d 31 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the U.S. Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on January 24, 1984. An order denying Samuel Wright's timely petition for rehearing was dated and entered on April 3, 1984. Samuel Wright's time to file a petition for a writ of certiorari was extended to and including August 31, 1984, by an order of Justice Thurgood Marshall dated June 25, 1984. 28 U.S.C. § 1254(1) is the statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2255 reads, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

The Hobbs Act, 18 U.S.C. §1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires so to do, ... shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section --
>
> ***
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory of Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> ***

The statute covering conspiracy to defraud the United States of federal funds, 18 U.S.C. §371, provides in part:

§371. Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

***

Petitioner is asserting he has been deprived of due process of law and his right to indictment by an impartial and independent grand jury in violation of the following provisions of the Fifth Amendment:

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person ... be deprived of life, liberty, or property, without due process of law;....

STATEMENT OF THE CASE

In its present posture this case centers on a conflict of interest to which Thomas Puccio, an Assistant United States Attorney for the Eastern District of New York, was subject in investigating and presenting to a second grand jury charges against Samuel D. Wright.

The case against Wright was assigned to Puccio by the United States Attorney, David Trager, after another Assistant, James Druker, the head of the Official Corruption Unit, had presented evidence of charges against Wright to another grand jury over a 1½ year period and declined prosecution. At the time of the reassignment to Puccio the only viable charge remaining out of a welter of charges against Wright that had been considered by Druker concerned the payment to Wright of $5,000 in 1973

by Behavioral Research Laboratories (BRL). Jt. App. at 704. BRL was a San Francisco company marketing reading materials to schools in New York City and throughout the nation. The $5,000 was paid to Wright following his appearance as a speaker at a conference held in San Francisco by BRL in February 1973. Wright was then Chairman of School Board 23 in Brooklyn, New York.

The assignment of the case against Wright to Puccio came shortly after Puccio's marriage to the former Carol Ziegler, a lawyer, whom he met when she came to his office in early 1974 with the first accusations against Wright to be received by the United States Attorney. Carol Ziegler was a political opponent of Wright who harbored personal animosity against him, and persistently brought criminal and other charges against him to the at-

tention of law enforcement and other authorities.

The facts with respect to this conflict of interest and the proceedings it has thus far occasioned are set forth fully and concisely in the opinion of the Court of Appeals reproduced in the Appendix to this petition.

After the case against him was reassigned to Puccio and Puccio's presentation to a new, second grand jury began, Wright complained to Washington about Puccio's conflict of interest and the political overtones of the decision to continue to seek his indictment.

Wright's complaint was investigated by the Office of Professional Responsibility of the Justice Department and rejected in a letter to Wright from the Attorney General, dated March 30, 1977.

A two-count indictment against

Wright was returned on April 1, 1977, charging him with extortion under color of official right and conspiracy to defraud the United States based upon the payment to him of the $5,000 by BRL.

Wright sought to dismiss indictment before trial based upon Puccio's conflict of interest. This motion was supported and opposed by affidavits of counsel and was denied without any factual hearing.

The trial, described by the Court of Appeals as "rather long and hotly contested," 588 F.2d at 39, took place before Judge Edward R. Neaher and a jury in the Eastern District of New York from March 27 to April 15, 1978.

The jury returned a verdict of guilty on both counts, and Wright was sentenced to 90 days in jail, 9 months probation and a $5,000 fine.

On appeal Wright renewed his claim

of error based on Puccio's conflict of interest. The Court of Appeals affirmed, terming the conflict of interest issue one of two grounds of appeal that "require little comment," 588 F.2d 31, 39, disposing of it as follows:

> "The district court properly rejected Wright's claim that the prosecution against him was biased because the wife of the Assistant United States Attorney who presented this case to the grand jury was allegedly a political opponent of Wright. The Justice Department's Counsel on Professional Responsibility reviewed the investigation and concluded that there had been no misconduct. We agree that no showing of bias of the prosecutor was made here. The American Bar Association Standards Relating to the Prosecution Function, § 1.2 provides that 'A conflict of interest may arise when, for example,...a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party or as counsel.' None of these circumstances was present here. We find no impropriety or appearance of impropriety."

Wright filed a petition attacking

his conviction under 28 U.S.C. § 2255 in April 1980. Both before and after the filing of the petition Wright developed new facts bearing on a range of issues, including the issues presented by Puccio's conflict of interest.

Judge Neaher dismissed the petition without an evidentiary hearing. With respect to Wright's claim of prosecutorial conflict of interest, despite the new facts shown by Wright, Judge Neaher saw "no reason for this Court to question either the statements of Mr. Trager, or the findings of the Justice Department" and "no valid reason to entertain once again petitioner's claim of prosecutorial conflict of interest." 559 F. Supp. at 1152-53.

A motion for reconsideration was made by Wright, Jt. App. at 894 and 900, which Judge Neaher declined to entertain as not properly before the

Court, id at 70, and Wright then appealed.

Although the Court of Appeals affirmed, its assessment of the conflict of interest issue differed markedly from that of the District Court. Its opinion, which is reproduced in the Appendix to this Petition and is discussed at length in the argument which follows, decided, among other things, that the new facts adduced by Wright on the conflict of interest issue were important in three respects, and made the issue "not so simple as this court believed in 1978." Slip Op. 1245.

The new facts showed that Mrs. Puccio was not merely a political opponent of Wright, but one whose activities against Wright were extensive and who "almost certainly harbored

personal animosity against Wright," Slip Op. 1250, that the material before the District Court in 1977 and the Court on the direct appeal did not characterize the position of AUSA Druker with complete accuracy, Slip Op. 1247, and that the investigation by the Office of Professional Responsibility on which the District Court and the Court of Appeals placed such reliance was perfunctory, and the exonerating letter from the Attorney General was Trager's own draft, Slip Op. 1247-48.

The Court of Appeals found it "hard to deny" that the decision to assign the further investigation of the BRL transaction to Puccio created an appearance of impropriety. Slip Op. 1250.

In affirming the denial of relief

and the dismissal of Wright's sec. 2255 petition, the Court expressed the view that Wright was properly found guilty, that he had not been deprived of due process, and that the degree of prosecutorial misconduct and prejudice shown by Wright in his sec. 2255 proceeding was insufficient to meet the high standard necessary on collateral attack, even though the direct appeal might well have been decided in Wright's favor if the facts now adduced by Wright had then been before the Court.

Wright filed a petition for rehearing which was denied without reasons.

This petition followed.

REASONS FOR GRANTING THE WRIT

1. On his present motion under 28 U.S.C. § 2255 Samuel Wright should not be required to clear a significantly higher hurdle than he faced on direct appeal in order to prevail on the issue of prosecutorial conflict of interest which he raised on his direct appeal and which was decided against him on that appeal because the United States Attorney's office and the Justice Department then misstated and concealed facts that would have led the Court to rule in his favor.

The Court of Appeals, relying on United States v. Addonizio, 442 U.S. 178 (1979) and Hill v. United States, 368 U.S. 424 (1962), in effect adhered to the principle that a collateral challenge may not do service for an appeal. See United States v. Frady, 456 U.S. 152, 165 (1982), reaffirming "the well-settled principle that to obtain collateral relief a

prisoner must clear a significantly higher hurdle than would exist on direct appeal." 456 U.S. at 166 (footnote omitted).

Petitioner has no quarrel with this principle as a general proposition. However, it should not control in a case, such as the present one, where petitioner raised the issue on direct appeal and is required to mount a collateral attack in order to raise the issue again because facts known to the government were not fully and fairly presented by it on the direct appeal.

The Court of Appeals strongly indicated, without deciding, that Samuel Wright would have prevailed on the direct appeal if the facts adduced in the 2255 proceeding had then been before it:

> Whether Wright's conviction should have been reversed and the indictment dismissed or at least there should have been a remand for an evidentiary hearing, if the

> facts now established by him had been before us on his direct appeal, is a question of some difficulty, but one that we need not decide. Slip Op. 1251
>
> * * *
>
> Even if we were to assume arguendo that we would have directed dismissal of the indictment in the exercise of our supervisory power, see United States v. Hogan, supra, 712 F.2d at 761, 762 n. 2, if the facts now adduced by Wright had been before us on direct appeal, it does not follow that they afford ground for relief under 28 U.S.C. § 2255. Slip Op. 1253.

In seeking rehearing in the Court of Appeals, Samuel Wright suggested to the Court that it might treat the issues as part of the direct appeal "by recalling its mandate and allowing an untimely petition for rehearing," citing Factors Etc., Inc. v. Pro Arts, Inc., 701 F.2d 11 (2d Cir. 1983), an alternative which Wright argued is consistent with the concept

that a "motion under sec. 2255 is a further step in the movant's criminal case and not a separate civil action." Advisory Committee Note to Rule 1 of the Rules Governing sec. 2255 Proceedings. In denying Wright's petition for rehearing, the Court of Appeals made no response to this suggestion.

The policies which are served by limiting grounds for collateral attack more narrowly than grounds for direct appeal would not be subverted if the issue of prosecutorial conflict of interest tendered by Samuel Wright under sec. 2255 was tested by the same hurdle as would exist on direct appeal. The facts of this case are unique in three respects not likely to be repeated: (1) the issue of prosecutorial conflict of interest was raised at all stages, and is not new, (2) the essential facts in this sec. 2255 proceeding

are new in the sense that they are being presented for the first time and (3) they are facts that at all times have been known to the government and within its possession and control.

The facts now before the Court should have been before the court on the direct appeal. That they were not is attributable solely to the government. The government knew the full extent of the facts which the Court of Appeals identified as not having been before it on the direct appeal; petitioner did not. The government knew the full extent of Mrs. Puccio's activities (though we cannot be sure even today that the record fully shows all of her activities against petitioner, and the full scope and expression of her personal animus, as well as that of her husband). The government knew the truth

about AUSA Druker's position, which the Court of Appeals said was not characterized "with complete accuracy." Slip Op. 1247. The government knew the investigation of the Counsel on Professional Responsibility was perfunctory and that the exonerating letter from the Attorney General was Trager's own draft.

While the Court of Appeals spelled out with precision these missing facts, it did not perceive the full lack of candor in the presentation of facts by David Trager while he was United States Attorney and thereafter. Indeed the Court observed at one point that it had no basis to question Trager's statements that he decided to make the assignment and that Puccio resisted, Slip Op. 1250-51, and at another point said that the decision to pursue the investigation was made by him and not

by Puccio, Slip Op. 1255.

Trager's lack of candor was striking in its totality, and provides ample basis for questioning Trager's statements at every turn. This lack of candor is an important element of the government's responsibility for the incompleteness and inaccuracy of the facts before the Court on the direct appeal.

Mr. Trager flatly asserted in 1977, in a memorandum of law filed in opposition to the motions to dismiss the indictment, that there was never any declination, Jt. App. at 403, when in fact there had been a declination by AUSA Druker in 1976, Id. at 405.

In the same 1977 memorandum, Mr. Trager scoffed at the idea and denied any exhaustive investigation of petitioner's financial affairs had occurred or was ever possible, Id. at 403. How-

ever, there was a 1976 IRS report extensively analyzing petitioner's finances for 1972 and 1973, and referring to investigations conducted by the United States Attorney's office, the FBI in San Francisco and the Brooklyn Intelligence Division. Id. at 549, 562, 573.

Mr. Trager inaccurately minimized for the Court Mrs. Puccio's activities against Samuel Wright, Id. at 633, note. Earlier in that year he advised the Office of Professional Responsibility (OPR) that he had acted with "full knowledge of Puccio's wife's prior activities against Wright," Id. at 339, an assertion that seems unlikely in light of what is now known, but that makes his impartiality suspect, if it is true. Trager presumably endorsed or at least acquiesced in Puccio's inaccurate statement to OPR that his

wife's activities against Samuel Wright were minimal and that she had not had anything to do with school board politics for some time (at least one year) Id. at 339. At that time, among other things, a voting rights complaint that Carol Ziegler had filed with the Justice Department against Samuel Wright was still pending, see Id. at 397.

In his 1977 affidavit Mr. Trager made selective use of AUSA Druker's memorandum, omitting to tell the Court of AUSA Druker's conclusion that many of the charges against Samuel Wright were baseless and the result of political antagonism by the "outs" against the "ins." Id. at 632, 942.

Mr. Trager did not candidly acknowledge that AUSA Puccio made his presentation to a new grand jury, and not a grand jury that had received the evidence AUSA Druker began presenting in 1975.

Nor did Trager mention the grand jury that Puccio told the FBI early in 1974 had been impaneled. Id. at 684. Trager's statements instead led the District Court to the apparently mistaken understanding "that the only grand jury investigation into the BRL payment began in 1975 and concluded with the indictment in 1977." Id. at 180.

Mr. Trager conveyed an impression to the Court before trial that exaggerated the thoroughness and independence of the investigation conducted by the Office of Professional Responsibility, and concealed that it was perfunctory and relied almost entirely on assurances and representations by Messrs. Trager and Puccio. Mr. Trager's 1977 affidavit did so by quoting the full text of Attorney Bell's letter of Samuel Wright, Id. at 634, 340, which described

the Justice Department's inquiry as a "complete review" and lauded the thoroughness and professionalism of the U.S. Attorney's investigation. This technique spared Mr. Trager from himself having to misstate the nature of the inquiry undertaken by the Office of Professional Responsibility. Mr. Trager failed, however, to advise the Court that he had drafted the Attorney General's letter, Id. at 944.

In a memorandum to the Office of Professional Responsibility at the time of its investigation, Mr. Trager suggests that a lack of federal jurisdiction was the reason AUSA Druker declined federal prosecution, and that AUSA Druker was mistaken, Id. at 944. The suggestion is disingenuous and implausible. It is unlikely that AUSA Druker, as an experienced federal prosecutor in charge of the Official

Corruption Unit would have had such a mistaken notion of federal jurisdiction.

To allow the government to be in a better position in a subsequent sec. 2255 proceeding by virtue of this misconduct in failing to present the facts fully and fairly at trial and on direct appeal would be offensive to the rule of law, and should itself be viewed as a miscarriage of justice cognizable under sec. 2255. Cf. Hill v. United States, 368 U.S. 424, 429 (1962) ("It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances...").

2. This Court and the Courts of Appeal possess the authority to exercise their supervisory power over the administration of justice in this proceeding under 28 U.S.C. § 2255.

In United States v. Hasting, 76 L.E.2d 96 (1983) this Court divided on the question whether the Courts of Appeal could reverse a criminal conviction in the exercise of their supervisory power based upon an error that was harmless, judged solely by its effect in the particular case. The prosecutor's errors in Hasting were statements in summation commenting improperly on the failure of the defendants to testify. Errors of this kind, impinging on the right of a defendant to remain silent, were a recurrent problem in the Seventh Circuit, persisting despite repeated judicial admonitions. This arguably justified reversal apart from the effect of the error in the

particular case.

The case at bar merits review by this Court because it presents the same kind of tension as existed in Hasting. Here there are reasons for exercising the supervisory power extending beyond the confines of the individual case. Here also, on the view of the case taken by the Court of Appeals, there is a degree of harm in the individual case arguably below the level requiring or authorizing redress if the case is considered alone.

Petitioner does, of course, differ with the Court of Appeals and contends in the present case that the prosecutorial conflict of interest he challenges deprived him of his constitutional right to due process of law and to indictment by an independent grand jury, and that a showing sufficient to prevail on the direct appeal should suf-

fice in this sec. 2255 proceeding on the facts of this case.

Acceptance of these arguments of petitioner would make unnecessary the exercise of this Court's supervisory powers, although there would nonetheless be important precedential value to a judicial statement that this case involved not only, for example, a deprivation of due process but also a kind of prosecutorial misconduct sufficiently harmful to the administration of justice to warrant the imposition of sanctions in the exercise of the Court's supervisory powers.

The Court of Appeals took the view that it lacked authority to exercise its supervisory power in Samuel Wright's favor, even on the assumption which it was willing to make arguendo that it would have directed dismissal of the indictment in the exercise of its

supervisory power on the direct appeal, if the facts adduced in the sec. 2255 case by Wright had then been before it. Slip Op. 1253. In other words, the Court of Appeals viewed Addonizio and Hill as imposing limits that precluded exercise of its supervisory powers absent a due process violation, which if present, would have obviated the need to invoke its supervisory power.

On the analysis of the Court of Appeals, this Court's supervisory power is similarly circumscribed in a sec. 2255 case by Addonizio and Hill, since these are decisions of this Court limiting this Court's permissible grounds for awarding relief under sec. 2255.

The question whether the supervisory power of this Court and the Courts of Appeal are so circumscribed in a sec. 2255 case is one that merits review by this Court. Apart from

the present case we have found no case expressly limiting the federal judicial power to supervise the administration of justice in sec. 2255 cases and one sec. 2255 case in which the Court appears to take the view that its supervisory power is not so circumscribed, although reaching this result, at least in part, as a matter of statutory construction. Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

The supervisory power of this Court and the Courts of Appeal over the administration of justice is an inherent judicial power. As we argued to the Court of Appeals in seeking rehearing, to the extent the limited reach of sec. 2255 imposed in cases such as Addonizio and Hill implements legislative commands or purposes, the limitations cannot restrict this Court's supervisory power

without violating important principles of judicial independence and separation of powers.

The question whether the supervisory power of the federal courts is limited in sec. 2255 cases should turn on an analysis and balancing of the values protected and served by the supervisory power and sec. 2255. Cf. U.S. v. Hasting, 76 L.E.2d at 104-05, reconciling the goals implicated by supervisory powers with the interests served by the harmless error rule.

Although the prosecutorial conflict of interest in this case is one that has seldom if ever surfaced in reported cases, it is a manifestation of a persistent and serious problem in the administration of criminal justice, as the Court of Appeals recognized in Hogan - "prosecutorial impairment of the grand

jury's independent role." 712 F.2d at 761. The misconduct here by the United States Attorney was flagrant and purposeful. If we accept Mr. Trager at his word (which petitioner is not required to do) he acted with full knowledge of Mrs. Puccio's activities against petitioner, Jt. App. at 339, and with an awareness of the charges the conflict would engender Id. at 944-45.* The denigration of the role of the grand jury has become so ingrained and habitual on the part of the United States Attorney's office that the government throughout this case has repeatedly asserted without any self-consciousness

*The Government's position is not enhanced by the purported reluctance of AUSA Puccio to undertake the case against Samuel Wright, Id. at 945. The reluctance may simply have reflected AUSA Puccio's awareness that he would be operating under a conflict of interest and that if he did not obtain Samuel Wright's indictment he ran the risk of incurring his wife's wrath.

that the decision to prosecute was made solely by U.S. Attorney Trager without any reference to the role of the Grand Jury and its discretionary decision whether to indict.

Given the judgment in Hogan that "prosecutorial impairment of the grand jury's independent role" is a problem meriting exercise of the Court's supervisory powers, to impose a cut-off in sec. 2255 cases on the ability of the federal courts to employ the supervisory power to cope with this problem would be arbitrary and make no sense.

The prosecutorial conduct being challenged in this case merits condemnation not only because it constituted an abuse of the impartiality and independence of the grand jury process but because it betokened an indifference to important prosecutorial ethical and

legal responsibilities. The indifference extended not only to creation of the conflict of interest and allowing it to operate under challenge without qualms, but also to the conduct of a perfunctory investigation by the office in the Justice Department charged with insuring the Department's integrity, followed by misleading and inaccurate presentations of fact to the Courts.

In an era when the Justice Department engages in such ethically and legally marginal activities as ABSCAM, Greylord and similar operations, and also has been assigned heavy responsibilities for monitoring the integrity of government officials and operations, this obtuseness to ethical and legal norms poses genuine threats to the integrity of the judicial process. Thus,

this Court's exercise of its supervisory powers to condemn the conduct in this case of the United States Attorney's office and the Justice Department would have an important and necessary salutary effect on the administration of justice.

3. Samuel Wright was deprived of his right to due process of law and to indictment by an impartial and independent grand jury in violation of the Fifth Amendment because the case against him was presented to a second grand jury by an Assistant United States Attorney who had an improper personal interest in securing Wright's indictment, and the government thereafter rejected Wright's charges of conflict of interest before his indictment on the basis of a perfunctory investigation when the issue was raised by Wright before and after trial on his direct appeal.

Samuel Wright's constitutional rights were violated in two distinct respects by Thomas Puccio's presentation of the case against him to a second grand jury and the government's related misconduct: he was deprived of his

right to indictment by an independent grand jury and to due process of law. The Court of Appeals ruled that neither of these claims amounted to a constitutional violation.

This assessment of petitioner's fundamental constitutional rights merits review by this Court. So far as we are aware, this Court has not yet said with precision what limits there may be "on a financial or personal interest of one who performs a prosecutorial function" particularly "if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." See Marshall v. Jerrico, 446 U.S. 238,250 (1980) (statutory reimbursement provision applying civil penalties for violations of the child labor law toward the Labor

Department's costs of enforcing the law did not violate the Due Process Clause).

If the grand jury is to stand, as the Constitution promises it shall, as a bulwark protecting the individual citizen against oppressive and unfounded government prosecution, see United States v. Calandra, 414 U.S. 338, 342-43 (1974), the independence of the grand jury must be scrupulously honored. No potential for prosecutorial manipulation or undue influence should be tolerated, especially one that is knowingly originated by the prosecutor unbeknownst to the grand jury, as was Puccio's conflict of interest. The grand jury was unaware of Thomas Puccio's personal interest in securing Wright's indictment, and therefore had no reason to be alert to this bias and to guard against its effects.

There can be no question that petitioner would have been entitled to reversal of his conviction if he had been tried and convicted without his case having been presented to a grand jury or if he was convicted of charges not set forth in the indictment returned against him, see Stirone v. U.S., 361 U.S. 212 (1960) (conviction on a charge the grand jury never made was fatal error).

Because the presentation to the grand jury and the deliberations of the grand jury may well have been tainted by Puccio's conflict of interest, and because any such taint would often be undetectable, this case in legal effect should be equated to one in which there had been no grand jury action. See United States v. Sells Engineering, Inc., 77 L.Ed. 2d 743, 758 (1983) (if and when grand jury misuse does occur, it would often be very difficult to detect and

prove). Any less rigorous a rule would too greatly compromise the Constitution's guarantee of indictment by an independent grand jury. There is no undue prejudice to federal prosecutors in requiring them to act carefully and scrupulously in choosing the prosecutors who make presentations to federal grand juries.

After determining that on the facts before it there had been an impermissible conflict of interest, the Court of Appeals ruled that there was no violation of due process in the absence of evidence of specific misbehavior on Puccio's part. Slip Op. 1255.

This approach to the due process issue seemed to be at variance with the credence the Court had earlier in its opinion appeared to give to the two cases which had vacated convictions

because of prosecutorial conflicts of interest, Ganger v. Peyton, 379 F.2d 709 (4 Cit. 1967); People v. Zimmer, 51 N.Y. 2d 390 (1980). These cases recognized that prosecutorial conflict of interest is so inherently prejudicial and the prejudice is so difficult to demonstrate as a practical matter that no showing of actual prejudice is required, see Zimmer, 51 N.Y. 2d at 395 ("the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice.") and that this is particularly true when the conflict operates at the grand jury, pre-indictment stage when prosecutorial discretion is widest, see Zimmer, 51 N.Y.2d at 394, and abuse is difficult to detect and

prove, see U.S. v. Sells Engineering, supra, 77 L.Ed 2d at 758.

As was said in Ganger, 379 F.2d at 914:

> "[We] do not know and cannot now ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owed to all persons charged with crime in his court."

Without saying whether or not it agreed that the prosecutor's conduct in Ganger constituted a violation of due process, the Court drew several distinctions between that case and Wright's. Petitioner submits that these distinctions are unpersuasive, and that there is an inconsistency between the two cases that it would be useful for this Court to resolve or clarify in the exercise of its certiorari jurisdiction.

One such distinction drawn by the Court is that the prosecutor's impermissible interest in Ganger was

pecuniary, whereas Mrs. Puccio's interest was a public one, Slip Op. 1256. Earlier in its opinion, however, the Court described Mrs. Puccio as one "who almost certainly harbored personal animosity against Wright." Slip Op. 1250. Without delving into matters of psychology beyond our ken, it is fair to note that public interests may be mixed with personal ones and that motives of ego or libido can be as powerful and compelling as pecuniary ones, and as harmful to the rule of law and integrity of government.

The distinction the Court draws based on the fact that the decision to pursue the investigation was made by Trager, not by Puccio, and that the indictment was signed by Trager also rests on unproven assumptions. As the Court points out, the distinction fails if it turns out that Puccio was the

real instigator of the decision to proceed before a new grand jury, a point that petitioner submits is open and would be very much in need of factual resolution, were it not rendered moot by Trager's own bias as demonstrated by his consistent lack of candor in this case. The distinction also fails if the evidence developed by Puccio's investigation is one-sided or otherwise tainted, thereby nullifying any curative effect that might otherwise flow from Trager's approval of the indictment. More generally, once Puccio's conflict of interest is put in motion, it can be expected to operate in unseen ways, and Trager's participation, whether his motives are pure or not, can provide no assurance the conflict of interest will not work to Wright's prejudice.

Perhaps the Court's conclusion that the conflict of interest engendered no violation of due process rests on the Court's view which it expressed in various ways, that Wright was guilty and that, at most, the investigation of the case and its presentation to the grand jury by Puccio rather than a disinterested Assistant deprived Wright of the chance "he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found guilty." Slip Op. 1256a.

This analysis by the Court of Appeals is fallacious and unfair. It ignores the fact that the prosecutor with most familiarity with the case, the head of the Official Corruption Unit, who had every incentive to make a case against Wright, declined prosecution and thought that, at most, Wright had illegally accepted a gratuity--a mis-

demeanor under state law. It also ignores somewhat naively the many ways a conflict of interest operating at the investigative pre-indictment stage can make a case against a criminal defendant that would not otherwise exist, creating a "reality" that is not open to effective challenge.

As we develop in the fourth point of this petition which follows, because he has been denied discovery and an evidentiary hearing, Wright does not know and cannot pinpoint the various actions by which Puccio may have shaped the evidence against him, and as stressed above, even with full discovery and a hearing, perhaps some of these measures may be undetectable no matter how thoroughly explored.

But there is one element of the case that Wright can with some force

suggest may have been warped by one-sided prosecutorial action--the element of inducement that was crucial to Wright's conviction for extortion under the Hobbs Act, and almost certainly for conspiracy as well. The concept of inducement, like the concept of extortion under color of official right, is nebulous and difficult to articulate, as the Court of Appeals itself has recently recognized. United States v. O'Grady, Docket No. 82-1344, (2 Cir. July 12, 1984) (en banc).

In Wright's case there well may have been a question as the investigation began as to who took the initiative, Wright or BRL. There was no direct proof at trial of any inducement by Wright, and it was AUSA Druker's assessment that BRL gave the $5,000 to Wright "as part of an intensive

effort to secure District 23's business," which suggests that it was BRL that did the inducing.

The 3500 material, which is the only grand jury material Wright has, shows that on March 23, 1977, after the Justice Department had conducted its perfunctory investigation, and less than 10 days before April 1, the day the indictment against Wright was returned, Allen Calvin was called before the grand jury for a third time and asked a series of leading questions which elicited and impressed upon him that it was Wright who induced BRL. Given the conflict of interest which was then operating, exacerbated as it was by Wright's effrontery (as Trager viewed it) in complaining to Washington about Puccio's role, this last-minute coaching of a key witness on the crucial

and ambiguous element of inducement, concretely confirms the violation of due process that was inherent in Puccio's manifestly improper conflict of interest.

4. Samuel Wright should have been granted the full discovery and the evidentiary hearing he repeatedly requested and was denied prior to the dismissal of his sec. 2255 proceeding.

The question whether Samuel Wright was improperly denied full discovery and an evidentiary hearing is an important procedural issue in the administration of 28 U.S.C. §2255 that merits review by this Court.

In general terms, the Courts below accorded a deference to the assertions of the government in opposition to the motion that was unwarranted in fact and unauthorized under sec. 2255.

The opening language of 28 U.S.C. §2255 requires that an evidentiary hearing be held if the motion raises an issue of fact which cannot be conclusively determined from "the motion and the files and records of the case." See Walker v. Johnston, 312 U.S. 275 (1941).

The Court of Appeals upheld the denial of a hearing relying in part on the portion of Trager's 1977 affidavit that claimed Trager acted entirely on his own initiative without any instigation by Puccio. Slip Op. n. 10 at 1256. In petitioner's view, given the deficiencies in Trager's presentation of the facts, the 1977 affidavit cannot be taken at face value particularly on such a conclusory and self-serving assertion. But in any event, the 1977 affidavit does not purport to describe facts which the opinion of the Court of Appeals makes crucial: how Puccio conducted the investigation and presentation to the Grand Jury.

In considering whether Puccio's special interest in securing Wright's indictment was a violation of due process the Court noted it was proceeding "in the

absence of evidence of specific misbehavior on Puccio's part." Slip Op. 1255, and that petitioner did not allege "flagrant and unconscionable" incidents of the kind which led to the dismissal of an indictment after conviction in U.S. v. Hogan, Slip Op. 1251. Assuming petitioner need show misconduct, (and it is petitioner's position that he does not because of the presence of "reasonable potential for prejudice," Slip Op. 1252), petitioner sought to develop such evidence. He was denied both the discovery and the evidentiary hearing he sought into Puccio's actions before the grand jury that might have brought such specific misbehavior to light.

Petitioner did not know and sought to learn what AUSA Puccio did before the grand jury--how he introduced the matter, how he charged the grand jury, the witnesses he called, the questions

he asked (except for witnesses who testified at the trial, i.e. 3500 material), the attitudes he may have conveyed by words or deeds and how he may have otherwise exercised his discretion and performed his duties toward the grand jury. We do know that AUSA Puccio chose to proceed before a brand new grand jury, one impaneled on August 16, 1976, Jt. App. at 301, that had not been addressed by AUSA Druker, and was entirely unfamiliar with the prior investigation of Samuel Wright.

Petitioner sought to discover what AUSA Puccio did before the grand jury. See, for example Jt. App. at 799, 800-01; see also 811, item 7. The government consistently resisted petitioner's efforts, and tried to minimize the gap in petitioner's knowledge by arguing that AUSA Puccio was merely following up on evidence developed by AUSA Druker. But

this argument that Puccio's role was essentially ministerial was belied by Mr. Trager's assessment of the investigation as "complicated" and as so demanding that he chose Mr. Puccio because he had to "go with [his] best," his most experienced Assistant. id. at 945.

In Hogan, the "flagrant and unconscionable" incidents included a question by a grand juror and the prosecutor's response, 712 F.2d at 760. Such exchanges may have occurred between Puccio and his grand jurors, as for example, during the third and last grand jury appearance of Allen Calvin on March 23, 1977, after the "investigation" by the Counsel on Professional Responsibility and less than ten days before Wright's indictment. The questioning on this last occasion, by AUSA Rocco, forcefully led the witness on the sub-

ject of inducement. Calvin was then excused and for undisclosed reasons repeatedly recalled for further questioning, very likely prompted by juror's comments or questions. Govt. Ex. 3500-8.

If appellant was required to make a showing of specific misconduct as in Hogan, he was entitled to know what happened during these intervals, and in general to have the facts as to Puccio's presentation to the grand jury.

In addition to questions about Puccio's conduct of the grand jury proceedings there were other important issues of fact on which Wright was entitled to an evidentiary hearing.

Various of the assertions of Mr. Trager, for example, should have been presented by live testimony subject to the test of cross-examination. Common sense and experience suggest Trager's involvement in the investigation and

indictment of Samuel Wright may have been as perfunctory as the OPR's investigation, and that Trager's knowledge of the case is likely to have come from his staff, and principally from Puccio. Whether Mr. Trager was influenced in some subtle ways by his assistants cannot be ascertained by affidavit on the basis of his impressions or convictions alone, no matter how firmly held. Subordinates do influence their administrators in unseen ways.

A hearing was also required to develop facts as to Mrs. Puccio's motives and interests, particularly since the Court of Appeals distinguished Ganger v. Peyton, 379 F.2d 709 (4 Cir. 1976) in part on the ground that the interest of Mrs. Puccio in proceeding against Wright was public not pecuniary, Slip Op. 1250. The full extent of the activities Mrs. Puccio may have carried out against

Samuel Wright both before and after her marriage to Thomas Puccio and other manifestations of her animus against him are crucial subjects Samuel Wright should have been permitted to develop at the evidentiary hearing contemplated by 28 U.S.C. § 2255.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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August 31, 1984

APPENDIX

[CORRECTED COPY]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 307—August Term 1983

(Argued: November 1, 1983 Decided: January 24, 1984)

Docket No. 83-2150

SAMUEL D. WRIGHT,

Petitioner-Appellant,

—against—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

FEINBERG, *Chief Judge*,
FRIENDLY and PRATT, *Circuit Judges.*

Appeal by Samuel D. Wright from orders of the District Court for the Eastern District of New York, Edward R. Neaher, *Judge*, dismissing his petition for post-conviction relief pursuant to 28 U.S.C. § 2255 and Fed. R.

Crim. P. 33, on the ground, among others, that he was deprived of the right to a disinterested prosecutor, 559 F. Supp. 1139, and denying reconsideration of the said order. See *United States v. Wright*, 588 F.2d 31 (2 Cir. 1978), *cert. denied*, 440 U.S. 917 (1979). Affirmed.

RAMSEY CLARK, New York, New York (Lawrence W. Schilling, New York, New York, David S. Golub, Silver, Golub & Sandak, Stamford, Connecticut), *for Petitioner-Appellant.*

L. KEVIN SHERIDAN, Assistant United States Attorney for the Eastern District of New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge*:

More than five years ago we affirmed the conviction of appellant Samuel D. Wright, onetime chairman of New York City Community School Board 23 and later a New York City councilman, in the District Court for the Eastern District of New York, for having solicited and received "under color of official right" a payment of $5,000 from Behavioral Research Laboratories, Inc. (BRL), a seller of educational systems and materials, in violation of the Hobbs Act, 18 U.S.C. § 1951, and conspiring to defraud the United States of federal funds

granted to the school district in violation of 18 U.S.C. § 371, *United States v. Wright,* 588 F.2d 31 (1978), *cert. denied,* 440 U.S. 917 (1979). Wright was sentenced to three months incarceration, nine months probation and a $5,000 fine.

In April, 1980, after having served his prison sentence, Wright, on the last day of his probation term, filed a motion for relief under 28 U.S.C. § 2255 and Fed. R. Crim. P. 33.[1] Pursuant to an informal discovery agreement between Wright's counsel and the office of the United States Attorney and various state and federal Freedom of Information Act requests, Wright obtained a quantity of additional materials which he appended to his

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1 28 U.S.C. § 2255 reads, in pertinent part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was no authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

The Government contended in the district court that Wright could not avail himself of § 2255 since he was no longer in custody at the time he filed the petition. This contention was correctly overruled by the district court, see 559 F. Supp. at 1142 n.2 and cases there cited, and the Government does not press it here.

motion papers. The Government also filed voluminous opposition papers and affidavits. The district court's opinion states, 559 F. Supp. at 1142, that "[i]n December of 1982, petitioner's *pro se* request for further discovery was filed, along with what appears to be the final version of petitioner's substantive claims", and that "[s]ince petitioner now appears to have satisfied himself that he has filed sufficient documentary evidence of his claims, his request for a hearing on the merits of his § 2255 motion can now be addressed," *id.* The court denied the request and dismissed the petition. Wright appeals from the order and a later order denying reconsideration.

The district court considered that Wright's claims fell into three distinct categories. These were (1) a claim that the Government suppressed various documents and materials in violation of its constitutional obligations of disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), (2) a claim that some members of the jury may have been prejudiced against him as a black, and (3) a claim of prosecutorial conflict of interest. With respect to the first two categories, we find nothing that can usefully be added to Judge Neaher's thorough discussion of the facts and the law. We shall therefore limit this opinion to Wright's third point.[2]

Before trial Wright had moved for dismissal of the indictment against him on the ground of a prosecutorial conflict of interest. The motion was supported by an affidavit of Gustave H. Newman, Wright's then attorney. The affidavit alleged that the indictment stemmed from a

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2 Our view that the district court properly rejected Wright's claims relating to juror prejudice and *Brady* violations in turn requires acceptance of its dismissal of his Rule 33 motion. Wright's conflict of interest claim relates only to proceedings before the grand jury, and as such, has nothing to do with occurrences at trial—the touchstone of a Rule 33 motion.

grand jury presentation begun in late 1976 by Assistant United States Attorney Thomas Puccio into Wright's financial affairs and political activities. It alleged that there had been two previous grand jury investigations of Wright, one under the direction of former Assistant United States Attorney James Druker and another under the direction of Puccio, and that no indictments had been filed; that in 1976 Wright waged a bitterly fought primary campaign against Representative Shirley Chisholm which polarized Brooklyn's black community; that supporters of Representative Chisholm and opponents of Wright actively sought to induce the Brooklyn district attorney or the United States Attorney, David Trager, to launch a prosecution of Wright; and that the latter effort bore fruit for improper reasons. "The impropriety in question" was said to be founded "upon the activist role Mrs. Thomas Puccio, an attorney who we believe is employed in the community by a local federally funded poverty law office, has played as a public activist opposed to the leadership and role occupied by Samuel D. Wright." Jt. App. at 722. The affidavit claimed that

> [a]s a publicly acknowledged opponent of Wright and his programs, her in-put with a senior member on the United States Attorney's staff, both actually and in appearance, pitted the might and resources of the federal government against Wright for reasons of political and idealogical [sic] differences rather than due to an objective analysis of Wright's conduct.

Id. The motion requested "*in camera* judicial review of the prosecution's internal files, in conformity with the holding in *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974), to insure that prosecutor Puccio and the United States Attorney's Office prosecuted because they be-

lieved, in good faith, that federal law was violated, and not by reason of extrinsic and improper in-put." Jt. App. at 723.

Mr. Trager submitted an opposing affidavit (the 1977 affidavit). This characterized the "chronology of the investigation of Mr. Wright, about which his attorney has no personal knowledge" as "simply the product of somebody's imagination." *Id.* at 631. It said there was no investigation of Mr. Wright in 1973; that Dr. Druker did not join the staff of the United States Attorney's office until the latter part of 1974; that at that time, after becoming United States Attorney, Mr. Trager had created an Official Corruption Unit and appointed Druker to head it; and that, due to the pendency of other investigations, it was not until some time in 1975 that evidence with respect to the charges made in the indictment was presented. The affidavit went on in a manner set forth in the margin.[3]

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3 Mr. Druker did not conclude, contrary to the defendant's claim, that "no evidence of criminality was found relating to Wright's School Board activities" (Newman Aff. p. 3). Indeed, in a memorandum describing the progress of the investigation of all of the allegations against the defendant, which Mr. Druker prepared in June, 1976, prior to resigning as an Assistant United States Attorney, he described as "specious" the defendant's claim that the payment he received from B.R.L. was for a speaking engagement, and he advised me that "the evidence is quite clear that, as part of an intensive effort to secure District 23's business, Samuel D. Wright was given $5,000 by B.R.L. officials." It was because of this conclusion and my own feeling that the defendant could not possibly command $5,500 as an "honorarium", that I decided to continue the investigation and assign it to assistant United States Attorneys Thomas P. Puccio and Victor J. Rocco.

The decision to reassign the case to Messrs. Puccio and Rocco was made on my own initiative, after consultation with my Chief Assistant, Edward R. Korman. Mr. Puccio did not suggest that the investigation be continued, nor did he ask to be assigned to it. The reassignment had nothing to do with the defendant's challenge to

On March 28, 1978, the district court denied the motion to dismiss the indictment, rejecting the argument

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Shirley Chisholm's bid for renomination. Of course, the indictment itself came months after the conclusion of the primary election.

The defendant's motion thus boils down to the claim that this indictment should be dismissed because the wife of one of the Assistant United States Attorneys, who worked on the investigation, was associated—as a junior attorney—with the Brownsville Office of the Brooklyn Community Legal Services Corp., which provided legal representation to groups "which actively worked and campaigned against Councilman Wright in his quest for public office (such as when he successfully contended against U.S. Representative Shirley Chisholm's bid for renomination, when he sought election to the local school board and when a Wright-supported slate [sought election to the local school board])" (Memo. p. 30).

Although the description of Mrs. Puccio's association with the Brownsville Office of the Brooklyn Community Legal Services fails to take account of the fact that she left that office almost two years before the indictment, and a year before the Wright-Chisholm primary,[*] the suggestion that he was indicted because of Mrs. Puccio's influence on her husband is simply ludicrous. "[T]he discretionary determination to prosecute" (Def. Memo. p. 31) was made by me solely on the basis of the evidence, which I, and my Chief Assistant, thoroughly reviewed. It had nothing whatever to do with any desire by me to align myself with any particular faction opposed to Mr. Wright.

Moreover, the indictment of the defendant was delayed until the Counsel on Professional Responsibility of the Department of Justice investigated the claims which Mr. Wright now asserts. The Counsel, who is responsible solely to the Attorney General and investigates claims of impropriety made against Department of Justice personnel, concluded that the allegations were without

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[*] I am advised that: Mrs. Puccio, whose name is Carol Ziegler, graduated from N.Y.U. Law School in June 1973 and joined the Brownsville Office in September, 1973, prior to her admission to the New York Bar in March, 1974, and after Mr. Wright was elected to membership on Local Board No. 23. She left the Brownsville Office in 1975, approximately two years before the indictment was returned in this case, and long before Mr. Wright "contested United States Representative Shirley Chisholm's bid for renomination." She was not personally involved in any election campaign against the defendant, and whatever role she did play while in the Brownsville office was in her capacity as an attorney employed by the Brooklyn Community Legal Services Corp.

with respect to prosecutorial conflict of interest "[o]n the basis of the representations made by the United States Attorney, and in light of the report by the Attorney General and the Counsel on Professional Responsibility."

This court affirmed, saying:

> The district court properly rejected Wright's claim that the prosecution against him was biased because the wife of the Assistant United States Attorney who presented this case to the grand jury was allegedly a political opponent of Wright. The Justice Department's Counsel on Professional Responsibility re-

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merit. Indeed, the defendant was so advised on March 30, 1977, in a letter from Attorney General Bell, which reads as follows (Exh. F infra):

> This is in reference to your letter of March 2, 1977, which alleged certain improprieties in an on-going investigation being conducted by a grand jury sitting in the Eastern District of New York.
>
> A complete review of that investigation was undertaken by the Counsel on Professional Responsibility who reports directly to me and who has the responsibility for investigating complaints of misconduct by Department of Justice personnel. The Counsel concluded that the investigation has been conducted in a thorough and professional manner, under the direct supervision of the United States Attorney, and that it should continue to proceed in that fashion.
>
> If you have other complaints against Departmental employees, I would appreciate your having your attorney communicate them directly to the Counsel on Professional Responsibility.[*]

Only after the Attorney General himself advised the defendant that the investigation should proceed was the indictment returned.

Jt. App. at 632-35.

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[*] The last paragraph of the Attorney General's letter referred to the fact that the defendant, who was then represented by one of the ablest criminal trial lawyers in New York City, thought that the best way to stop his impending indictment was to go by himself to see a member of the White House staff, who had no responsibilities whatever in this area, and seek her intervention.

> viewed the investigation and concluded that there had been no misconduct. We agree that no showing of bias of the prosecutor was made here. The American Bar Association Standards Relating to the Prosecution Function, § 1.2, provides that "A conflict of interest may arise when, for example, . . . a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party or as counsel." None of these circumstances was present here. We find no impropriety or appearance of impropriety.

588 F.2d at 39.

It now develops that the issue was not so simple as this court believed in 1978. The new material submitted in support of Wright's § 2255 petition went beyond what was then before us in three important respects:

(1) The anti-Wright activities of Mrs. Puccio, the former Carol Ziegler, were not merely those of "a political opponent" of Wright. Early in 1974 Puccio reported to the FBI that Ms. Ziegler, then an attorney in the Brownsville office of the Brooklyn Legal Services Corporation, submitted a report to him, prepared under the auspices of the Community Action for Legal Services Incorporated, a project which was federally funded by the Office of Economic Opportunity, alleging a misapplication of Title I funds by Wright and School Board 23.[4] He said that a grand jury had been impaneled and that he would be willing to prosecute under 18 U.S.C. §§ 1001 and 371 if the allegations were proved. On March 15, 1974, when interviewed by the FBI, Ms. Ziegler said she had written many informal letters to various local, state and federal

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[4] This appears to have been Ms. Ziegler's first acquaintance with Puccio whom she was to marry on May 23, 1976.

agencies, and that she and her office would be willing to contact any potential witnesses or aid the FBI in any manner during the investigation of Local School Board 23. She was interviewed again on April 1, 1974. Most of this interview concerned a meeting of Local School Board 23 on March 28, 1974, to elect a successor to Wright, who had been obliged to resign as chairman because of his election to the New York City Council. She said the meeting had become unruly; that three members started to leave the meeting; and that when she went to the platform in an effort to prevent this, another member grabbed her by the neck to force her to leave. She then described another violent episode to which she was merely a spectator. The FBI discussed this with Puccio, who had another meeting on April 4 with Ziegler, FBI agents and members of parent organizations. Puccio advised that he would have grand jury subpoenas issued and that any further incidents might therefore constitute obstructions of justice.

On July 24, 1975, Ms. Ziegler and Arnold Rothbaum of the Williamsburg Neighborhood Legal Services sent a letter to the Voting Rights Section of the Civil Rights Division of the Department of Justice complaining of irregularities in the community school board election on May 6, 1975. An FBI report dated August 21, 1975, records that Puccio had advised that while his office had not initiated an investigation of the election, he "was aware of the Department's interest in this election and furthermore was also cognizant of the complainants since the complainants had also contacted his office." Jt. App. at 699. On December 18, Ziegler and Rothbaum wrote a seven page letter to the New York City Board of Education detailing alleged acts of misconduct by School Board 23 going back to 1971.

(2) The material before the district court in 1977 and this court on appeal did not characterize the position of Assistant United States Attorney Druker with complete accuracy. An FBI memorandum entitled "Samuel Wright et al.—Fraud against the Government" records that on April 20, 1976, Druker advised "he would decline prosecution in this matter" and "that the facts developed in this matter lack prosecutive merit in Federal Court." Jt. App. at 405. On June 7 Druker submitted a long memorandum to United States Attorney Trager on the subject of "School District 23 Allegations." Addressing himself to the $5,000 payment by BRL to Wright, he said:

> While District 23 appears to have disregarded City Bidding Regulations in the aforesaid purchases, there appears to be no conduct violative of federal law. However, the evidence is quite clear that, as part of an intensive effort to secure District 23's business, Samuel D. Wright was given $5000 by BRL officials for a specious speaking engagement. It is the writer's belief that the evidence of same should be referred to the Kings County District Attorney for consideration in light of New York State's Penal Law which, inter alia, makes it a misdemeanor for a public official to accept gratuities under such circumstances.

Jt. App. at 943. It was after this that the United States Attorney reassigned the matter to Puccio, who had recently married Ms. Ziegler. Puccio, on August 17, 1976, impaneled a new grand jury which ultimately returned the instant indictment on April 1, 1977.

(3) The investigation by the Counsel on Professional Responsibility of the Department of Justice, on which the district court and this court placed such reliance, was perfunctory and the exonerating letter from the Attorney

General was Trager's own draft except that the latter was shortened by omitting paragraphs which referred to Wright's reluctance to cooperate with the U.S. Attorney's investigation of his alleged receipt of an illegal bribe and Wright's seeking intervention on his behalf of a member of the White House staff. All that occurred was a meeting on March 16, 1977, in Brooklyn between Michael Shaheen, Jr., counsel for the Office of Professional Responsibility, and Steven Blackhurst, its assistant counsel, on the one hand, and Trager, his deputy, Korman, Puccio, and Puccio's assistant, Rocco, on the other. According to a memorandum by Blackhurst, Trager said that he had insisted that Puccio handle the Wright investigation and had done so with full knowledge of Mrs. Puccio's prior activities against Wright. Puccio added that "his wife's activities in opposition to Wright were minimal and that she had not had anything to do with school board politics for some time (at least one year)." Trager was asked "to draft a proposed response to Wright's letter for the DAG's signature." Jt. App. at 339. In forwarding the draft Trager reaffirmed that the decision to have Puccio "assigned to review the investigation that had previously been undertaken into the subject of the present inquiry was solely my own"; that "[i]n choosing Mr. Puccio to make this review, I was well aware of his wife's prior association, in the capacity of an anti-poverty lawyer, with some of Mr. Wright's political opponents", *id.* at 944; that Puccio did not initiate the investigation or the review and that Trager did not consult with him in making the decision; that, anticipating the charges now being made, Puccio was reluctant to undertake the case and that it took some urging on Trager's part to convince him; that despite this concern, Trager chose Puccio because of his belief that in a case of this significance "I had

to go 'with my best' " and that of all his assistants Puccio had the most experience in "conducting complicated investigations of this kind." *Id.* at 945. The letter, drafted by Trager and signed by Attorney General Bell, said that "[a] complete review of [the grand jury's] investigation was undertaken by the Counsel on Professional Responsibility", which had concluded "that the investigation has been conducted in a thorough and professional manner, under the direct supervision of the United States Attorney." *Id.* at 340.

The district court held that the new evidence presented by Wright "provides no reason for this Court to question either the statements of Mr. Trager, or the findings of the Justice Department." 559 F. Supp. at 1152. The court seemed to regard as dispositive that there was still no evidence that Mrs. Puccio "was 'a complaining witness' within the meaning of the ABA standards cited by the Court of Appeals" since none of the documents indicates that she was the source of the interest of the United States Attorney's office in the BRL payments, and thus no "evidence . . . support[s] even an inference of bias under the ABA standards." *Id.* at 1152-53.

DISCUSSION

We agree with appellant that the district court took too limited a view of the issue raised by him. The ABA Standards cited the relative or a complaining witness only as one example of a prosecutorial conflict of interest. Evidently the ABA considered the examples to be confusing since the current version, ABA Standards for Criminal Justice § 3-1.2 (2d ed. 1980), says simply that "[a] prosecutor should avoid the appearance or reality of

a conflict of interest with respect to official duties.[5] We find it hard to deny that the decision, after one grand jury investigation of the BRL transaction had terminated without the prosecutor's seeking an indictment, to assign Wright's case for further investigation to a prosecutor whose wife was not merely a political opponent of Wright's but a lawyer who had on two occasions brought complaints to federal authorities that could have resulted in criminal charges against him, who had actively petitioned various federal, state and local agencies to investigate Wright's alleged misdeeds, who had allegedly been assaulted by Wright's minions, and who almost certainly harbored personal animosity against Wright, created an appearance of impropriety.[6] Indeed, Puccio himself seems to have thought that it would. While we have no basis to

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5 The commentary adds:

> Standard 3-2.3(b) recommends that the offices of chief prosecutor and staff be full-time occupations. The commentary to that standard points out that a conflict of interest may arise from part-time devotion to the duties of public prosecutor. The instant standard complements this provision.
>
> When the possibility of a conflict of interest arises, the prosecutor should recuse himself or herself and make appropriate arrangements for the handling of the particular matter by other counsel in accordance with the principles contained in this chapter.[1] It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office.

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1 See standard 3-2.10.

6 As said in *People v. Zimmer*, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 708, 434 N.Y.S.2d 206, 209 (1980),

> [W]hat impression could the defendant have had of the fairness of a prosecution instituted by one with the personal and financial attachments of this prosecutor? Would it have been unreasonable for the defendant—or others—to doubt that the public officer, whose burden it was to screen the complaint for frivolousness and, if necessary, guide its destiny before the Grand Jury, would do so disinterestedly?

question Trager's statements that he decided to make the assignment and that Puccio resisted, this is irrelevant to the appearance of impropriety. The United States Attorney did not sufficiently consider this when he decided to "go with [his] best." Puccio may have been the "best" for other cases but certainly not for this one. It would have been far better to have a slightly less effective prosecutor—if, in fact, such a choice had to be made—not married to a woman who had twice notified federal authorities of activities of Wright's in connection with School Board 23, other than those here at issue, that could have resulted in his indictment.

Whether Wright's conviction should have been reversed and the indictment dismissed or at least there should have been a remand for an evidentiary hearing, if the facts now established by him had been before us on his direct appeal, is a question of some difficulty, but one that we need not decide. Appellate dismissal of an indictment for prosecutorial misconduct, after a conviction following a fair trial to an unbiased jury, is strong medicine. Wright does not allege prosecutorial misconduct approaching the "flagrant and unconscionable" incidents which recently led us to dismiss an indictment after a conviction in *United States v. Hogan*, 712 F.2d 757, 762 (2 Cir. 1983). If the claim were to be regarded as one of selective or discriminatory prosecution, Wright's case would clearly fail to meet the first prong of the test laid down in *United States v. Berrios*, 501 F.2d 1207, 1211 (2 Cir. 1974), and probably the second as well, see *United States v. Ross*, 719 F.2d 615 (2 Cir. 1983). However, the claim in fact was of something different, namely, that Wright was deprived of his entitlement to a "disinterested" prosecutor.[7] The

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7 This phrasing seems to state the problem better than the usual reference to conflict of interest. In cases like this, where there is no

concept is not altogether easy to define. Of course, a prosecutor need not be disinterested on the issue whether a prospective defendant has committed the crime with which he is charged. If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. See *In re Perlin*, 589 F.2d 260, 264 (7 Cir. 1978). True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury—not the prosecutor. It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged. Moreover, as the New York Court of Appeals has recently said in dismissing an indictment where a part-time district attorney had been corporate counsel to and a stockholder of a corporation which the defendant was charged with defrauding, "the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *People v. Zimmer*, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 208 (1980). See also *People v. Superior Court of Contra Costa County*, 19 Cal.3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977) (disqualifying district attorney from prosecuting charge of murder when victim's mother was in his employ and

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basis for a claim that the prosecutor did not believe the defendant to be guilty, the claim is not that the prosecutor had an interest in opposition to his proper one in securing an indictment and a conviction; it is rather that he had an additional and impermissible reason in forwarding the prosecution.

was embroiled in custody litigation with victim's ex-wife who was one of defendants).[8]

Even if we were to assume *arguendo* that we would have directed dismissal of the indictment in the exercise of our supervisory power, see *United States v. Hogan, supra*, 712 F.2d at 761, 762 n.2, if the facts now adduced by Wright had been before us on the direct appeal, it does not follow that they afford ground for relief under 28 U.S.C. § 2255. As said in *United States v. Addonizio*, 442 U.S. 178, 184-85 (1979) (footnotes omitted):

> It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attacks on final judgments are well-known and basic to our adversary system of justice. The question in this case is whether an error has occurred that is sufficiently fundamental to come within those narrow limits.

The Court went on to say that "unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited", *id.* at 185, and referred to the statement in *Hill v. United*

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8 We note in passing that a lesser showing may warrant disqualification of a prosecutor rather than dismissal of an indictment. See generally *United States v. Heldt*, 668 F.2d 1238, 1274-78 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). Indeed, we think that the degree of prosecutorial misconduct of the sort here in question and the degree of prejudice to the defendant necessary to justify action by a reviewing court steadily increases as the case goes forward, with the least being required on a motion to disqualify, somewhat more on a pretrial motion to dismiss an indictment, still more on a motion in the district court after conviction but before appeal, somewhat more on direct appeal, and as will be developed below, a good deal more on collateral attack.

States, 368 U.S. 424, 428 (1962), that non-jurisdictional and non-constitutional claims are cognizable under § 2255 only if they reveal "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure," see *United States v. Addonizio, supra,* 442 U.S. at 185.

Wright's claims do not begin to measure up to the *Hill* standard for non-constitutional and non-jurisdictional error. Wright was found guilty beyond a reasonable doubt on ample evidence after a fair trial before an unbiased jury. There is no reason to question that the grand jury had sufficient evidence to support the lesser requirement of probable cause to believe that Wright had committed the crimes charged.[9] Wright's claim is rather that if Trager had accepted Druker's recommendation or even if, not accepting it, he had designated an assistant to pursue the investigation who did not have the special adverse interest attributed to Puccio, Wright would not or might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed. Painful as this necessarily is to Wright, it would be going beyond all bounds to call the result "a complete miscarriage of justice" or "inconsistent with the rudimentary demands of fair procedure." *Compare Grimes v. United States,* 607 F.2d 6, 11 (2 Cir. 1979) *with Azzone v. United States,* 341 F.2d 417, 418-19 (8 Cir.), *cert. denied,* 381 U.S. 943 (1965).

We thus reach the question whether the existence of what we will assume to have been a special interest of

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9 The Government had made available to Wright the grand jury testimony of the witnesses it called at trial pursuant to the Jencks Act, 18 U.S.C. § 3500. Wright does not claim that this testimony was insufficient to warrant the indictment.

Puccio's in securing Wright's indictment constituted a violation of due process, and thus a constitutional error, in the absence of evidence of specific misbehavior on Puccio's part. Here Wright understandably places great reliance on *Ganger v. Peyton,* 379 F.2d 709 (4 Cir. 1967), which, under 28 U.S.C. § 2254, set aside a state conviction as a violation of due process because the prosecutor was serving two masters. Ganger was prosecuted and convicted for an assault on his wife. The prosecutor, a part-time state prosecutor, as in *People v. Zimmer, supra,* 51 N.Y.2d 390, 414 N.E.2d 705, 434 N.Y.S.2d 206, discussed above, was representing the wife in a pending divorce action based on the same assault. Ganger testified that the prosecutor offered to drop the assault charge if Ganger would make a favorable property settlement in the divorce action, and the district judge so found. The Fourth Circuit held that the prosecutor's representation of Mrs. Ganger in the divorce proceeding "suggests the strong possibility that the prosecuting attorney may have abdicated to the prosecuting witness (Ganger's wife) in the criminal case the exercise of his responsibility and discretion in making charge decisions," 379 F.2d at 713, and that this violated due process.

Whether or not we would agree that the manifest impropriety of the prosecutor's conduct in *Ganger* constituted a violation of due process, there are several distinctions between that case and Wright's. Here the decision to pursue the investigation was made by Trager, not by Puccio, and the indictment was signed by him; in order for Wright's case to be comparable with Ganger's in this respect, we would have to draw an inference that Puccio was the real instigator of the decision to proceed before a new grand jury although Wright does not even allege this

and all the evidence is to the contrary.[10] Second, even if we interpret the facts most adversely to Wright's prosecutors, they were not utilizing the criminal process to advance their own pecuniary interests, such as the prosecutor's interest in *Ganger* "that the size of his fee would be determined by what could be exacted from defendant" in the divorce case, *id.* at 713. It is argued that just as the prosecutor in *Ganger* was "attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger", *id.* at 714, Puccio was attempting to serve both the United States and his own wife. However, Mrs. Puccio's interest, unlike Mrs. Ganger's, was not a pecuniary interest in utilizing the criminal process to further her position in civil litigation but a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust. Compare *Azzone v. United States, supra,* 341 F.2d at 418-19. In short, this case, with the facts taken at their worst against the Government, does not present the spectacle of a prosecutor's using the "awful instruments of the criminal law", *McNabb v. United States,* 318 U.S. 332, 343 (1943) (Frankfurter, J.), for purpose of private gain and, although we consider the choice of Puccio as prosecutor to have been ill advised, we do not regard it as

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10 We recognize that, as held in *Walker v. Johnston*, 312 U.S. 275 (1941), the opening qualification in 28 U.S.C. § 2255, "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief", cannot be met by affidavits opposing the petition, although we have said that such affidavits may be considered as showing that a petitioner's allegations are not to be deemed admitted as distinguished from showing them to be false, *see e.g., Dalli v. United States*, 491 F.2d 758, 762 n.4 (2 Cir. 1974); *United States v. Franzese*, 525 F.2d 27, 30-31 (2 Cir. 1975), *cert. denied*, 424 U.S. 921 (1976). However, Trager's 1977 affidavit, in contrast to the affidavits by him and Druker in response to the § 2255 petition, does constitute part of "the files and records of the case".

having deprived Wright of due process of law. At the very most, and the allegations scarcely go this far, it deprived him of the chance that, with another prosecutor, he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty.

Affirmed.

United States Court of Appeals

Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United Staes Courthouse, in the City of New York, on the 3rd day of April one thousand nine hundred and eighty-four.

SAMUEL D. WRIGHT,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Samuel D. Wright,

Upon consideration by the panel that heard the appeal, it is

Order that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

United States Court of Appeals
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United Staes Courthouse in the City of New York, on the twenty-fourth day of January, one thousand nine hundred and eighty-four.

Present:

HON. WILFRED FEINBERG
Chief Judge
HON: HENRY J. FRIENDLY
HON. GEORGE C. PRATT
Circuit Judges,

SAMUEL D. WRIGHT,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

The mandate, consisting of the items checked below, has been received.
☒ opinion
☒ order
☐ statement of costs
Received by s/ L. Williams
Date 2/26/84

A. Daniel Fusaro,
Clerk

By: Edward J. Guardaro
Deputy Clerk

Office - Supreme Court, U.S.
FILED
DEC 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-357

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL D. WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly concluded that petitioner was not entitled to habeas corpus relief or to an evidentiary hearing based on his claim of prosecutorial conflict of interest before the grand jury.

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In the Supreme Court of the United States

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No. 84-357

SAMUEL D. WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported, as corrected, at 732 F.2d 1048. The opinion of the district court (which is not reprinted in the appendix to the petition) is reported at 559 F. Supp. 1139.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23) was entered on January 24, 1984. A petition for rehearing was denied on April 3, 1984 (Pet. App. A22). The petition for a writ of certiorari was filed, pursuant to an extension of time, on August 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former chairman of a New York City Community School Board and a onetime New York City councilman. Following a jury trial in 1978 in the United

States District Court for the Eastern District of New York, he was convicted on one count of soliciting and receiving "under color of official right" a payment of $5000 from Behavioral Research Laboratories, Inc. (BRL), a seller of educational systems and materials, in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of conspiring to defraud the United States of federal funds granted to the school district, in violation of 18 U.S.C. 371. He was sentenced to three months' imprisonment, nine months' probation, and a $5000 fine. Pet. App. A2-A3. His conviction was affirmed by the court of appeals, and this Court denied further review. *United States* v. *Wright*, 588 F.2d 31 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979). The extensive evidence of petitioner's guilt, much of which was documentary, is summarized in the court of appeals' opinion on direct appeal (see 588 F.2d at 32-35).

2. In 1980, after completing his term of imprisonment and on the last day of his probation, petitioner filed the present action under 28 U.S.C. 2255. He challenged his conviction on the ground of prosecutorial conflict of interest before the grand jury. In particular, petitioner alleged impermissible bias at the grand jury stage because Thomas Puccio, the Assistant United States Attorney who presented the case to the grand jury that indicted petitioner, was married to a political opponent of petitioner (C.A. App. 83-84).[1] This issue had been raised and rejected in petitioner's direct appeal (see 588 F.2d at 39).[2] However, based on documents obtained pursuant to informal discovery from the government and Freedom of Information Act requests under federal and state law, petitioner submitted

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[1]Puccio was not the prosecutor at petitioner's trial.

[2]Indeed, the issue of prosecutorial conflict of interest was the sole question presented in the petition for a writ of certiorari that this Court denied on direct review.

certain additional materials in support of his claim. Pet. App. A3-A4.[3]

The district judge who had presided at petitioner's trial rejected the argument that the "prosecution was instituted by the United States Attorney's Office for improper political reasons." 559 F. Supp. 1139, 1152 (E.D.N.Y. 1983). The court found that "[t]he new evidence now cited by petitioner provides no reason * * * to question" the previous conclusion that the indictment was not tainted by prosecutorial conflict of interest (*ibid.*). Because the motion failed to raise material factual issues, the court also denied petitioner's request for further discovery and an evidentiary hearing (*id.* at 1153).

The court of appeals affirmed (Pet. App. A1-A21). It acknowledged that, in light of the further documentation submitted by petitioner, "the issue was not so simple as this court believed in 1978" (*id.* at A9). The court fully considered petitioner's new evidence and understood it to show that Puccio's wife had been involved in additional instances of activities against petitioner, that an Assistant United States Attorney other than Puccio had previously conducted a grand jury investigation of petitioner and was of the view that federal (as distinguished from state) charges should not be brought, and that an investigation by the Department of Justice's Counsel on Professional Responsibility into petitioner's allegations against the United States Attorney's office had been perfunctory and the letter

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[3]Petitioner also sought a new trial under Fed. R. Crim. P. 33 on the grounds that the government's failure to disclose various materials in connection with the original trial violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that some members of the jury might have been prejudiced against him for racial reasons. The district court rejected these contentions (559 F. Supp. 1139, 1143-1152 (E.D.N.Y. 1983)), and the court of appeals affirmed (Pet. App. A4 & n.2). Petitioner has not renewed these claims before this Court.

signed by the Attorney General exonerating the office had been adopted from a draft prepared by the United States Attorney in question (*id.* at A9-A13).[4] Based on these factors, the court concluded that it was "hard to deny that the decision" to assign Puccio to handle the grand jury proceeding "created an appearance of impropriety" (*id.* at A14 (footnote omitted)) and that "[i]t would have been far better" to bring in another Assistant United States Attorney (*id.* at A15).

However, "interpret[ing] the facts most adversely to [the] prosecutors" and "with the facts taken at their worst against the Government" (Pet. App. A20), the court of appeals held that petitioner was not entitled to reversal of his convictions under 28 U.S.C. 2255. The court concluded that, even if it assumed arguendo that it would have dismissed the indictment in the exercise of its supervisory power if the present record had been before it on direct appeal (Pet. App. A17),[5] petitioner had not alleged either a constitutional error or a nonconstitutional error resulting in a miscarriage of justice that would warrant collateral relief (*id.* at A18-A21).

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[4]We do not necessarily agree with the court's characteri zation of the record in this case. The government's position is set forth in its submissions to the court of appeals to correct the opinion. (Copies of these papers are being provided to counsel for petitioner and lodged with the Clerk of this Court.) Although the court of appeals modified its opinion in certain respects in response to those submissions, in our view the opinion still is not entirely accurate in reflecting the undisputed documentary record. Nevertheless, because petitioner is not entitled to relief even on the facts as viewed favorabiy to him by the court of appeals, we shall for present purposes accept without further discussion the court of appeals' understanding of the evidence.

[5]The court stated that the issue whether petitioner's conviction would have been reversed on direct appeal in light of the present record "is a question of some difficulty, but one that we need not decide" (Pet. App. A15). It did observe, however, that petitioner's claim did not satisfy the legal standard for establishing improper selective or discriminatory prosecution and did not "approach[]" the kind of flagrant prosecutorial misconduct before the grand jury that had been found sufficient in other cases to justify dismissal of an indictment on direct appeal (*ibid.*).

The court of appeals recognized that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant" (Pet. App. A16). It also indicated that " 'the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice' " (*ibid.* (citation omitted)). The court ruled, however, that petitioner's allegations were insufficient to set aside his convictions. It noted that "there is no basis for a claim that [Puccio] did not believe [petitioner] to be guilty" and that petitioner's contention instead was that Puccio "had an additional and impermissible reason in forwarding the prosecution" (*id.* at A15-A16 n.7). This contention was unavailing because "the decision to pursue the investigation was made by [United States Attorney] Trager, not by Puccio, and the indictment was signed by him" (*id.* at A19), and because in any event the alleged interest of Mrs. Puccio "was not a pecuniary interest * * * but a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust" (*id.* at A20). As the court of appeals summarized (*id.* at A18, A21 (footnote omitted)):

> [Petitioner] was found guilty beyond a reasonable doubt on ample evidence after a fair trial before an unbiased jury. There is no reason to question that the grand jury had sufficient evidence to support the lesser requirement of probable cause to believe that [petitioner] had committed the crimes charged. [Petitioner's] claim is rather that if * * * [Puccio had not been assigned to the grand jury investigation, petitioner] would not or might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed.
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> * * * * *

> At the very most, and the allegations scarcely go this far, [the choice of Puccio to handle the case at the grand jury stage] deprived [petitioner] of the chance that, with another prosecutor, he might have undeservedly escaped indictment and consequent conviction for crimes of which he was properly found to be guilty.

ARGUMENT

1. Petitioner does not dispute that he was found guilty by an impartial and properly instructed jury on the basis of proof beyond a reasonable doubt adduced at a fair trial. Rather, he seeks to have his convictions set aside under 28 U.S.C. 2255 on the ground of a prosecutorial conflict of interest before the grand jury that indicted him. The court of appeals correctly rejected petitioner's contention, and further review is not called for.

First, as petitioner himself acknowledges (Pet. 18, 32), "[t]he facts of this case are unique in * * * respects not likely to be repeated" and the alleged "prosecutorial conflict of interest in this case is one that has seldom if ever surfaced in reported cases." Given the novel character of the question presented, review by this Court is not indicated.

Moreover, the outcome in this case depends substantially upon an assessment of the nature and extent of Mrs. Puccio's activities against petitioner and the effect if any of her actions on the official conduct of the United States Attorney's office. Indeed, petitioner argues at length (see Pet. 20-26) that, while "the Court of Appeals spelled out with precision * * * [the relevant] facts, it did not perceive the[ir] full [importance]" (*id.* at 20). These largely fact-bound issues do not warrant this Court's attention, particularly since they were resolved against petitioner on the basis of an "interpret[ation of] the facts most adverse[] to [petitioner's] prosecutors" and "with the facts taken at their worst against the Government" (Pet. App. A20).

2. a. In any event, petitioner's argument is without merit. He first contends (Pet. 15-26) that his convictions should have been set aside under 28 U.S.C. 2255 if they would have been reversed on direct appeal.[6] However, in rejecting this contention the court of appeals followed established standards governing collateral relief. "It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States* v. *Addonizio*, 442 U.S. 178, 184-185 (1979) (footnote omitted). Thus, "a collateral challenge may not do service for an appeal. * * * * * [T]o obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States* v. *Frady*, 456 U.S. 152, 165, 166 (1982) (footnote omitted).

Petitioner does not take issue with this general principle (see Pet. 16), but he argues that it is inapplicable here because the inadequacies in the record on direct appeal were "attributable solely" (*id.* at 19) to the government's failure to bring to the court's attention the additional evidence that

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[6]The court of appeals has held that prosecutorial impropriety before the grand jury can be a basis for reversing a conviction on direct appeal. See *United States* v. *Hogan*, 712 F.2d 757 (2d Cir. 1983). However, contrary to petitioner's suggestions, the court below did not determine that it would have reversed petitioner's convictions on direct appeal if the present record had then been before it. Rather, as discussed above (see page 4 & note 5, *supra*), the court simply assumed without deciding that such reversal would have been appropriate, and in fact the court's opinion indicates considerable doubt whether the present record would justify overturning petitioner's convictions on direct appeal; as the court noted, "[a]ppellate dismissal of an indictment for prosecutorial misconduct, after a conviction following a fair trial to an unbiased jury, is strong medicine" (Pet. App. A15). Given that (as discussed below) petitioner has not shown a violation of any fundamental right, that the alleged conflict of interest did not involve flagrant or recurring conduct (see *ibid.*), and that there is no challenge to the grand jury's determination of probable cause (*id.* at A18 & n.9) or the petit jury's verdicts of guilty (*id.* at A18, A21), reversal of petitioner's convictions on direct appeal would not have been warranted.

petitioner has now developed. However, petitioner has made no showing that he could not have discovered the same information at the time of his trial; indeed, the government voluntarily agreed to provide information through informal discovery in the collateral proceeding, and in fact it appears that petitioner did not request materials pursuant to the Freedom of Information Act until well after his direct appeal had been concluded and he had completed his incarceration (see C.A. App. 806-807). As in cases involving claims of newly discovered evidence under Fed. R. Crim. P. 33,[7] a defendant pursuing post-conviction remedies cannot take advantage of his lack of diligence at trial.

b. Petitioner also argues (Pet. 27-36) that the court of appeals should have exercised its supervisory power to set aside his convictions on collateral attack.[8] However, a court's supervisory power cannot be used to circumvent established limitations on the legal rights or remedies that a defendant is invoking. See *Hobby* v. *United States*, No. 82-2140 (July 2, 1984), slip op. 10; *United States* v. *Hasting*, 461 U.S. 499, 505-507 (1983); *United States* v. *Payner*, 447 U.S. 727, 734-737 (1980); *Costello* v. *United States*, 350 U.S. 359, 363-364 (1956). For this reason, petitioner cannot rely on a court's supervisory power to avoid the requirements for collateral relief.

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[7]See 8A *Moore's Federal Practice* para. 33.03[1], at 33-18 (2d ed. 1983); 3 C. Wright, *Federal Practice and Procedure: Criminal* § 557, at 315, 327-329 (2d ed. 1982).

[8]Contrary to petitioner's statement (Pet. 29), the court of appeals did not hold that it "lacked authority" to exercise supervisory power. Indeed, the court's discussion of nonconstitutional and nonjurisdictional defects as a basis for granting collateral relief (Pet. App. A18), and its recognition that claims of prosecutorial misconduct are cognizable on collateral attack (*id.* at A17 n.8), suggest the opposite conclusion.

c. Accordingly, the real issue in this case is whether petitioner's claim of prosecutorial conflict of interest meets the standard for collateral relief (see Pet. 36-49). The court of appeals correctly concluded that it does not.

With respect to petitioner's constitutional argument, the court pointed out that "the decision to pursue the investigation was made by Trager, not by Puccio, and the indictment was signed by him. * * * [We cannot] draw an inference that Puccio was the real instigator of the decision to proceed * * * [especially since petitioner] does not even allege this and all the evidence is to the contrary" (Pet. App. A19-A20 (footnote omitted)). Moreover, in terms of the impropriety asserted by petitioner, the court observed that neither Mrs. Puccio nor the prosecutors were alleged to be "utilizing the criminal process to advance their own pecuniary interests" and that, at worst, Mrs. Puccio's interest was "a public one in the condemnation of a man whom she thought, whether for good reasons or for bad, to have violated the public trust" (*id.* at A20). Therefore, while the choice of Puccio as prosecutor before the grand jury may have been "ill advised," it did not violate due process as an effort to use the criminal law "for purpose of private gain" (*ibid.*).[9]

With respect to petitioner's assertion of a nonconstitutional error resulting in a miscarriage of justice, the court of appeals rightly observed that the claim of prosecutorial conflict of interest "do[es] not begin to measure up to [the required] standard" (Pet. App. A18). Emphasizing that

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[9]In light of Puccio's role in the prosecution and the nature of the alleged conflict of interest, the court of appeals correctly concluded (Pet. App. A19-A20) that, contrary to petitioner's argument (Pet. 42), the decision below does not conflict with *Ganger* v. *Peyton*, 379 F.2d 709 (4th Cir. 1967). *Ganger* involved an attempt by a part-time prosecutor to use criminal charges against a defendant to obtain a greater property settlement (and a potentially larger attorney's fee) in a pending divorce action in which the prosecutor represented the defendant's wife.

there was no reason to doubt the evidence before the grand jury of probable cause to indict and that the proof at trial established petitioner's guilt beyond a reasonable doubt, the court recognized that petitioner's argument is nothing more than a claim that, if Puccio had not been assigned to the investigation, petitioner "would not or might not have been indicted for a crime which, as the jury's verdict demonstrates, he had in fact committed" (*ibid.*). This argument falls far short of establishing a fundamental defect or manifest injustice.[10]

d. Finally, petitioner maintains (Pet. 50-57) that he was entitled to full discovery and an evidentiary hearing on his Section 2255 motion. He proposes, more than seven years after the indictment was returned, to undertake a broad exploration of a wide range of issues, including (i) "what * * * Puccio did before the grand jury — how he introduced the matter, how he charged the grand jury, the witnesses he called, the questions he asked * * *, the attitudes he may have conveyed by words or deeds and how he may have otherwise exercised his discretion and performed his duties toward the grand jury" (Pet. 52-53); (ii) "the assertions of Mr. Trager * * * [in his affidavits, his] involvement in the investigation and indictment of * * * [petitioner, his]

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[10]Petitioner complains (Pet. 46-49) about the appearance of Allen Calvin as a witness before the grand jury and the leading questions that were asked on the issue whether petitioner induced the payment from BRL. Of course, it is not a valid objection that the grand jury proceeding may not have conformed to the strict evidentiary and procedural rules applicable at trial. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956). Nor does this show, as petitioner asserts (Pet. 49), any bias on Puccio's part; indeed, as petitioner elsewhere recognizes (*id.* at 54), the questioning of Calvin before the grand jury was conducted by another Assistant United States Attorney, not by Puccio. Finally, to the extent that the question of inducement is relevant to petitioner's convictions, the petit jury necessarily found against petitioner in that regard, and the sufficiency of the evidence was upheld on direct appeal (588 F.2d at 33-35).

knowledge of the case * * * [and whether he] was influenced in some subtle ways by his assistants" (*id.* at 55-56); and (iii) "Mrs. Puccio's motives and interests * * * [as well as t]he full extent of the activities Mrs. Puccio may have carried out against [petitioner] both before and after her marriage * * * and other manifestations of her animus against him" (*id.* at 56-57).

The courts below properly declined to permit petitioner to pursue such an inquiry. Evidentiary discovery and a hearing are required only if the claim cannot be conclusively determined from the motion and the files and records of the case. See 28 U.S.C. 2255. In this case, even "with the facts taken at their worst against the Government" (Pet. App. A20), petitioner failed to present any issue that could not be properly resolved on the existing record.[11] Especially in view of the extensive materials provided to petitioner pursuant to informal discovery and his Freedom of Information Act requests, it was not error to conclude that additional discovery and a hearing were unnecessary, and further review of this question is not warranted.

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[11] In other words, it was the nature of the alleged impropriety, not the evidence in support of the allegation, that the court of appeals held to be insufficient to justify collateral relief. Indeed, by assuming arguendo that it might have reversed on direct appeal in light of the present evidence, the court made clear that its decision did not turn upon the lack of an adequate record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

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No. 84-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL D. WRIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Point I

The government's brief fails to answer petitioner's claim that Thomas Puccio's conflict of interest in presenting the case to the grand jury deprived petitioner of his constitutional right to indictment by an impartial and independent grand jury.

The government's brief takes a largely *ipse dixit* approach to the issue whether petitioner was deprived of his right to indictment by an impartial and independent grand jury.

The essential point to be made is that the conflict of interest to which Thomas Puccio was subject, or his lack of disinterestedness, as the Court of Appeals preferred to put it, makes it impossible as a practical matter to know whether the grand jury's impartiality or independence was fatally compromised.

The government begins its argument with the assertion: "Petitioner does not dispute that he was found guilty by an

impartial and properly instructed jury on the basis of proof beyond a reasonable doubt adduced at a fair trial." (U.S. brief, p. 6). Petitioner wholeheartedly disputes this assertion although petitioner has not sought to bring the dispute to this Court.

It matters not, however, on the grand jury issue, whether or not the trial was flawed. If petitioner had been tried and convicted without his case having been presented to a grand jury, there can be no question he would be entitled to reversal of the conviction, even if the trial itself was entirely free from error.

The government's assertion that "there is no challenge to the grand jury's determination of probable cause," brief n. 6 at 7, is a similarly inadequate answer to the question whether petitioner was deprived of his right to indictment by an

impartial and independent grand jury. Petitioner has refrained from alleging a lack of probable cause in the presentation to the grand jury because petitioner knows too little about what was presented to the grand jury. The 3500 materials are fragmentary and inconclusive. More basically, even if the record showed probable cause, this would be insufficient assurance, indeed no assurance at all, that the evidence before the grand jury and its deliberations themselves were untainted by Thomas Puccio's conflict of interest.

The government's brief fails to rebut or even address petitioner's key contention: this case in legal effect should be equated to one in which there has been no grand jury action.

Point II

The uniqueness of the government's misconduct and lack of candor in this case is a reason for granting certiorari not denying it -- the result reached by the Court of Appeals creates an intolerable incentive for future governmental misconduct.

In arguing that the petition presents "largely fact-bound issues" that "do not warrant this Court's attention" (U.S. brief, p. 6) the government first misunderstands the reason for the petition's reference to the uniqueness of the facts and then by overly loose paraphrase attributes to the petition a statement it does not contain.

The petition points out that the facts in this case are unique and not likely to be repeated, (Pet. pp. 18-19), in order to make the point that if petitioner's claims are recognized as cognizable under §2255, as petitioner urges they should be, this would not

create a major inroad into the well-established limits on the kinds of claims that are cognizable under §2255. The government mischaracterizes this point by arguing as it does that because the facts of the case are unique the question presented is novel and doesn't warrant review (U.S. brief, p. 6).

Given the high volume of motions under §2255, an issue as to the kinds of claims that are cognizable has important precedential value. The issue whether petitioner should be required to clear a significantly higher hurdle under §2255 than he faced on the direct appeal with respect to the issue of prosecutorial misconduct which he raised on the direct appeal is also important because it ties into the question whether a proceeding under §2255 is of a civil or criminal character. The nature of a §2255 pro-

ceeding was the subject of sharp disagreement in U.S. v. Frady, 456 U.S.152, 178-79, 181-83 (Brennan J. dissenting).

The most significant aspect of the result reached by the Court of Appeals is that it creates an intolerable incentive for future misconduct by the government. This potential for future mischief is not lessened in any way by the uniqueness of the facts in this case. The result reached by the Court of Appeals teaches that if the government can gain affirmance on the direct appeal by withholding or misstating facts, its success will be immune from challenge on collateral attack under §2255. The Court of Appeals has fashioned a rule which encourages and rewards deficient performance by the government on direct appeal in every case no matter what the facts.

The government's brief, at p. 6, con-

tains the following passage, set forth exactly as it appears:

> Indeed, petitioner argues at length (see Pet. 20-26) that, while "the Court of Appeals spelled out with precision *** [the relevant] facts, it did not perceive the[ir] full [importance]" (id. at 20).

The statement in petitioner's brief that the government is purporting to quote actually reads as follows, at p. 20:

> "While the Court of Appeals spelled out with precision these missing facts, it did not perceive the full lack of candor in the presentation of facts by David Trager while he was United States Attorney and thereafter."

The petition was stressing the importance of the government's "full lack of candor" as a reason why petitioner's claims should be cognizable under §2255 and as justification for the exercise of the Court's supervisory power. The petition was not as the government's paraphrase would suggest arguing that the

Court of Appeals failed to appreciate the full importance of the facts that the government withheld or misstated on the direct appeal. The Court of Appeals did appreciate the full importance of these facts. What the Court of Appeals failed to appreciate and to address was the full extent of the government's lack of candor and its misbehavior at all stages of this case. The issues raised by the government's lack of candor and misbehavior are not at all "fact-bound."

Point III

The government's lack of candor throughout this case has deprived petitioner of due process of law and should be condemned in the exercise of this Court's supervisory powers over the administration of the federal criminal justice system.

In opposing Samuel Wright's petition, the government is studiedly indifferent to the deficiencies in its behavior found by the Court of Appeals.The Solicitor General does not deign to address directly or express any chagrin or regret over Thomas Puccio's conflict of interest in presenting the case to the grand jury, the perfunctory nature of the investigation conducted by the Justice Department's Office of Professional Responsibility and the government's incomplete and misleading presentation of the facts at trial and on appeal. The government shows no awareness or concern over

the awful likelihood that the case is not only symptomatic, but representative of prosecutorial indifference or obtuseness to ethical and legal standards which should guide and control the conduct of federal prosecutors.

The government's brief handles the issue of misconduct obliquely. A footnote, n. 4, p. 4, refers to the government's repeated submissions to the Court of Appeals seeking "correction" of its opinion. These appear to be essentially plaints of David Trager, the former United States Attorney, much of whose conduct is central to this case. The Solicitor General stays above the fray, stating somewhat equivocally, n. 4 at p. 4:

> "We do not necessarily agree with the Court's characterization of the record in this case. The government's position is set forth in its submissions to the court of appeals to correct the opinion. (Copies of these papers are being provided to counsel for petitioner

> and lodged with the Clerk of this Court.) Although the court of appeals modified its opinion in certain respects in response to these submissions, in our view the opinion still is not entirely accurate in reflecting the disputed documentary record ..."

The Solicitor General's submissions include a letter dated May 11, 1984, from the United States Attorney to the Clerk of Court taking issue with the Court's failure to correct misstatements of fact relating to the issue of the role of Mrs. Puccio in petitioner's prosecution. There is a hand-written note in the upper left-hand corner of the first page of this letter which reads: "Court refused to accept this further submission." This note is unsigned and undated and the author is not identified.

As is true of so much of the government's conduct in this case, the note is true as far as it goes, but misleading in a way that is self-serving. What

actually happened is that the Clerk of the Court wrote in reply on June 6, 1984, advising the government that the panel consisting of Chief Judge Feinberg, Judges Friendly and Pratt had instructed her to return the letter "which it regards as repetitive, untimely, and without substantive merit." We have lodged a copy of this letter with the Clerk of the Court and are attaching a copy to this reply brief, R. App. 1.

As the petition points out, David Trager used Attorney General Bell's letter to misdescribe the Justice Department's perfunctory investigation as a "complete review" and to laud the thoroughness and professionalism of the U.S. Attorney's investigation. This technique spared Mr. Trager from himself having to misstate the nature of the inquiry undertaken by the Office of Professional Re-

sponsibility. Pet. p. 25. By relying on the submissions that the government made in the Court of Appeals, the Solicitor General similarly spares himself from having to make any representations of fact or to inform this Court fully and fairly of the action taken by the Court of Appeals in returning the government's last submission.

The government's prosecutorial judgments in this case have been consistently warped against petitioner. After years of investigation by a slew of agencies, petitioner was finally prosecuted for the receipt of a $5,000 honorarium, and this only after prosecution for receipt of this honorarium had been declined by the Assistant United States Attorney who had presented charges against petitioner to a grand jury for a year and a half.

The government's conduct in this

case from beginning to end has deprived petitioner of due process of law and merits condemnation in the exercise of this Court's supervisory power over the administration of criminal justice in the federal judicial system.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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December 27, 1984

R. App. 1

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
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New York 10007

Elaine B. Goldsmith
Clerk

June 6, 1984

L. Kevin Sheridan, Esq.
Executive Assistant
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Re: Samuel D. Wright v. United States
Docket No. 83-2150

Dear Mr. Sheridan:

Your letter of May 11, 1984, has been transmitted to the panel, consisting of Chief Judge Feinberg, Judges Friendly and Pratt. The panel has instructed me to return your letter, which it regards as repetitive, untimely, and without substantive merit.

Very truly yours,

s/ Elaine B. Goldsmith

Elaine B. Goldsmith,
Clerk

EBG:is

cc: Ramsey Clark, Esq.
Lawrence W. Schilling, Esq.
David S. Golub, Esq.